No. 87-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FMC WYOMING CORPORATION,
Petitioner,

v.

DONALD P. HODEL,
SECRETARY OF INTERIOR, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE WESTERN COAL TRAFFIC LEAGUE AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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BRIEF AMICI CURIAE

This brief is filed on behalf of the Western Coal Traffic League ("WCTL") and the National Rural Electric Cooperative Association ("NRECA") (jointly referred to as "Amici"). Pursuant to this Court's Rule 36, Amici have received the written consent of counsel for all parties to file this brief. Copies of the consents have been filed with the Clerk. Amici submit this brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by FMC Wyoming Corporation on October 6, 1987.

IDENTITY AND INTEREST

WCTL is an association of utility organizations who purchase and use over 50 million tons of bituminous coal annually. Nearly 100 percent of the coal consumed by WCTL members comes from mines located west of the Mississippi River. NRECA is a national service organization representing more than 1,000 rural electric systems in 46 states. These systems, mostly all cooperative, serve more than 25 million consumers in 2,600 of the 3,100 counties in the United States. Members of NRECA provide electricity to over 70 percent of the land area of this nation.

Amici appear on behalf of the nation's electric consumers. We conservatively estimate that implementation of the Department of the Interior ("DOI") royalty readjustment procedures upheld by the United States Court of Appeals for the Tenth Circuit in the proceeding below will produce an increase in consumer electric bills totalling over $2 billion in the next decade. By mandating these increases, the federal government has joined the ranks of other interest groups who have exploited their particular monopolies over utility purchasers of western coal.

Most federal coal is located in six western states (Colorado, Montana, New Mexico, North Dakota, Utah, and Wyoming). For many years, these coal lands lay largely undeveloped. However, at the urgent behest of the federal government during the Congressionally-declared "energy crisis" of the 1970's,[1] western utilities provided

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[1] During the 1970's, Congress enacted several laws directing utilities to utilize domestic coal as a boiler fuel. *See, e.g., Emergency Petroluem Allocation Act of 1973*, Pub. L. No. 93-511, 88 Stat. 1608 (1974); *Federal Non-nuclear Energy Research and Development Act of 1974*, Pub. L. No. 93-577, 88 Stat. 1878 (1974); *Energy Reorgan-*

the capital guarantees and long-term purchase commitments needed to develop these vast national resources. In 1973, federal coal production stood at 14 million tons. DOI, *Federal Coal Management Report (Fiscal Year 1986)* 65 (1987). Today, federal production equals 163.9 million tons (*id.*), and is projected to grow significantly by the year 2000. Most of this coal is sold to electric utilities via long-term coal supply contracts. These contracts—which were absolutely essential to the development of federal coal leases[2]—tie utility coal purchases to specific coal mines and require that utilities pay all production-based taxes and royalties (and increases in these expenses) on a direct pass-through basis.

After becoming "captive" to specific producing leases, states, and mines as a result of long-term contract commitments made at the express request of the federal government, utilities have seen various groups engage in special interest profiteering at their expense. First, five of the six federal coal producing states enacted massive increases in their state coal severance taxes of the type considered by this Court in *Commonwealth Edison Co* v.

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ization Act of 1974, Pub. L. No. 94-438, 88 Stat. 1233 (1974); *Energy Supply and Environmental Coordination Act of 1974*, Pub L. No. 93-319, 88 Stat. 246 (1974); *Energy Policy and Conservation Act*, Pub. L. No. 94-163, 89 Stat. 871 (1975); *Energy Conservation and Production Act*, Pub. L. No. 94-385, 90 Stat. 1125 (1976); and *Powerplant and Industrial Fuel Use Act*, Pub. L. No. 95-620, 92 Stat. 3289 (1978).

[2] Coal companies would not develop coal fields without assurances that utilities would commit for long-term purchases. Similarly, lenders would not provide capital to coal companies without assurances that the companies had guaranteed long-term customer purchase commitments.

State of Montana, 453 U.S. 609 (1981).[3] Next, the western coal-hauling railroads endeavored to exploit their power over the massive new western coal production by imposing monopolistic rates on coal of the type described in the Court's decision in *Burlington Northern Inc.* v. *United States*, 459 U.S. 131 (1983).[4] Now, the same federal government that urged utilities to become captive to federal coal is endeavoring to exploit its monopoly by unilaterally imposing tremendous royalty increases on federal coal—increases the government knows will be borne by electric utility ratepayers.

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[3] As observed by one commentator:

> [S]ince 1971 the coal-producing states have increased their severance taxes to *unprecedented levels*, bringing about a tremendous transfer of money from the coal-consuming states to the coal producing states.

Note, 8 Colum. J. Envir. L. 185, 186 (1982) (emphasis added). In 1985, for example, the State of Montana collected $91 million in coal severance taxes, and the State of Wyoming collected $125 million. U.S. Dep't of Commerce, *State Government Tax Collections in 1985*, Table 9 (1985). Over the past ten years (1976 to 1985), the States of Wyoming and Montana have collected a combined total of over $1.2 billion in severance taxes. *Id.*

[4] The well-known impact of western railroads monopoly pricing of western coal transportation is chronicled in Congressional reports as well as in the law reviews. *See, e.g.*, *Railroad Coal Rates and Public Participation: Oversight of ICC Decisionmaking Report, Together with Separate Views of the House Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, Comm. Print IFC-40, 96th Cong., 2d Sess. (1980); *Singing the Coal Train Blues: The ICC, Railroad Coal Hauling Rates and National Energy Policy*, 11 St. Mary's L.J. 734 (1980); Clark, *Coal Freight Rates in the United States: An Inevitable Conflict Between Economical Energy and Railroad Monopoly Pricing*, 44 I.C.C. Prac. J. 292 (1977); Freeman, *The Ties That Bind: Railroads, Coal, Utilities, the ICC and the Public Interest*, 14 Transp. L.J. 1 (1985).

The ultimate payors of the federal coal royalty are the nation's electric consumers. From an economic perspective they are the real parties in interest in these review proceedings. Accordingly, Amici have a direct and substantial interest in the issues raised by Petitioner, FMC Wyoming Corp.

REASONS FOR GRANTING THE WRIT

Amici support the reasons for granting certiorari set forth by Petitioner. Two additional grounds, discussed below, provide further support for granting the petition: (1) the Tenth Circuit's incorrect decision mistakenly paves the way for massive increases in consumer electric bills, and (2) Supreme Court review at this time could resolve the unprecedented number of similar litigations now pending at DOI and in the courts.

I. THE TENTH CIRCUIT'S DECISION MISTAKENLY SANCTIONS MULTI-BILLION DOLLAR CONSUMER PRICE INCREASES

The federal coal leases at issue here provided that Petitioner pay 17.5 cents per ton for the federal coal royalties for a twenty-year period. Petitioner's App. F at 58a. The Government reserved the right, however, to readjust the royalty rate "reasonably" on the twenty-year anniversary of the lease unless "otherwise provided by law at the time of the expiration of any such [twenty-year] period." *Id.* at 63a. The royalty rates and readjustment provisions in Petitioner's leases are identical to those found in the majority of leases that predate the Federal Coal Leasing Amendments Act ("FCLAA"), 30 U.S.C. § 201 *et seq.* (1982).[5]

[5] The "customary" average royalty rate on pre-FCLAA leases is 17-1/2 cents per ton. DOI, *Mineral Revenues: The 1985 Report on Receipts from Federal and Indian Lands* 87 (1986). The federal coal lease at issue is a standard "form" lease routinely utilized by DOI prior to FCLAA.

In the proceedings below DOI concluded that it was required by FCLAA to raise the 17.5 cent royalty rate to 12.5 percent of the value of the coal—the statutory minimum rate specified by FCLAA to apply to all post-FCLAA surface leases. DOI is routinely taking the same actions in all pre-FCLAA lease readjustment proceedings. DOI's automatic application of the FCLAA 12.5 percent royalty rate has increased individual utility customers royalty payments by up to 1500 percent. Overall, Amici estimate DOI's application of FCLAA royalty rates actions will produce royalty-induced price increases approximating at least $250 million annually (when all pre-FCLAA leases have been readjusted) and price inceases totalling over $2 billion in the next decade.[6]

The Tenth Circuit conceded that DOI's readjustment policies are not producing "reasonable" readjusted rates as required by the express terms of the pre-FCLAA lease. Indeed, the Court acknowledged the increase before it was a "drastic" one. Petitioner's App. A at 10a. However, the Court concluded that the "otherwise pro-

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[6] DOI reports that 163.9 million tons of federal coal were mined in federal fiscal year 1986 with a total sales price value of $2,321 million. *Federal Coal Management Report, supra*, at 65. Had the pre-FCLAA average royalty rate applied (17.5 cents per ton), federal royalty revenues would have equalled approximately $29 million (163.9 million tons x $.175). If the FCLAA minimums applied to this tonnage (assumed composite between surface and underground mines of 12.2%), the total collected would approximate $283 million ($2,321 million x 12.2%). The difference ($283 million-$29 million) approximates $250 million per year. DOI reported fiscal year 1986 actual royalty receipts of $101.1 million, which reflects the fact that many pre-FCLAA leases have not yet been readjusted. *See* General Accounting Office, *Mineral Resources: Coal Lease Readjustment Problems Remedied But Not All Revenue Is Collected* 17 (GAO/RCED-87-164, August 1987) ("*GAO Royalty Report*").

vided by law" provision in the lease required DOI to impose an unreasonable royalty rate because this result was mandated by Congress in FCLAA. This reading of FCLAA is manifestly incorrect.[7] The text of FCLAA does not state or imply in any way that Congress intended to impose unreasonable, "drastic" royalty rate increases on electric utility customers. Indeed, a review of the legislative history of FCLAA shows that Congress was particularly concerned that pre-FCLAA royalty levels produce only fair and reasonable royalty levels.

FCLAA was one of many pieces of legislation (*see* pp. 2-3, *supra*) enacted in response to the energy crisis. Its twin goals were to generate federal coal production "to meet the nation's energy needs,"[8] and at the same time to establish lease rates that produced a "*fair* return to the public."[9] To meet these goals, Congress established a minimum surface royalty rate of 12.5 percent of the value of coal "on all *new leases* except for underground mines." H.R. Rep. No. 94-681 at 18, *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 1954 (emphasis added). Congress did not specify that the new lease rates be automatically applied to pre-FCLAA leases persumably because it understood that such application would produce unfair and unreasonable increases in federal coal royalty collections. Indeed, FCLAA proponents vehemently main-

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[7] The District Court properly concluded that the reasonableness requirement in pre-FCLAA leases requires DOI to make "a complete evaluation of all factors involved in an individual case." Petitioner's App. B at 17a.

[8] S. Rep. No. 94-296, *Federal Coal Leasing Amendments Act of 1975*, 94th Cong., 1st Sess. 15 (1975).

[9] H.R. Rep. No. 94-681, *Federal Coal Leasing Amendments Act of 1975*, 94th Cong., 1st Sess. 17 (1975), *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 1943, 1953 (emphasis added).

tained that the legislation would not produce tremendous increases in federal coal royalty collections.[10]

DOI's elimination of the "reasonableness" requirements from federal coal lease readjustments and its automatic application of the 12.5 percent royalty rate are part of its deliberate plan to "maximize" federal returns from captive coal consumers.[11] This policy is nothing new to coal utility purchasers of federal coal, who, as described *supra*, have seen coal producing states (via severance taxes) and coal-carrying railroads (via coal freight rate hikes) endeavor to impose similarly oppressive price increases. Utilities and federal coal lessees always assumed that the government would live up to its lease

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[10] For example, Congressman Baucus of Montana maintained that "[t]his leasing reform will not significantly increase the price of coal." 122 *Cong. Rec.* 25463 (Aug. 4, 1976). The House Interior Committee similarly concluded that increases in royalty collections contemplated by Congress "will have virtually no inflationary impact on the U.S. economy. . . ." H.R. Rep. No. 94-681 at 26, *reprinted in* 1976 *U.S. Code Cong. & Admin. News* at 1963. However, significant price increases have occurred. The House Interior Committee reported that between 1920 and 1974, DOI collected $23.3 million in federal coal royalties. *Id.* at 18-19, *reprinted in* 1975 U.S. *Code Cong. & Admin. News* 1953-54. When all its members' federal leases are readjusted, WCTL estimates its members alone will pay nearly twice as much *annually* as the federal government collected during a 54-year period on all federal production. Increases of this magnitude were certainly not contemplated or intended by Congress to result via the application of FCLAA.

[11] In its rulemaking defining the coal "value" to which the FCLAA rate will be applied, DOI candidly admitted that its royalty policies are intended to "assure maximum, long-term revenues to all parties concerned." *Revision of Coal Production Valuation Regulations and Related Topics*, 52 Fed. Reg. 1840, 1841 (1987). DOI currently establishes royalty value in most instances as the coal sales price (including all state, local and federal taxes). 30 C.F.R. § 203.200(g).

commitments by imposing only "reasonable" royalty charges. This has proven to be untrue. Amici submit that the government's exploitation of its monopoly royalty pricing powers via tortured readings of its leases and its underlying statutory authority merits review by this Court.

II. REVIEW OF THE TENTH CIRCUIT'S DECISION IS NEEDED TO RESOLVE IDENTICAL ISSUES RAISED IN AN UNPRECEDENTED NUMBER OF PENDING LITIGATIONS

Petitioner's lease is only one of over 500 pre-FCLAA federal coal leases. The *GAO Royalty Report*, *supra*, found that DOI was managing 538 pre-FCLAA coal leases; that 329 of these leases were subjected to DOI adjustment procedures as of September 30, 1986; and that 98 of these lease readjusstments were the subject of pending litigation (78 on administrative appeals at DOI and 20 on appeal in the courts). *GAO Royalty Report* at 17. The total reported number of appeals is likely to grow as additional pre-FCLAA leases are readjusted. Most of these proceedings involve issues that are identical to those raised here.

The sheer magnitude of the pending readjustment cases as well as the financial impact these cases will have on the nation's electrical consumers support immediate Supreme Court review of the Tenth Circuit's decision. Review at this time will promote uniform construction of FCLAA and the underlying federal coal leases, and, if the decision below is set aside, protect consumers from unlawful royalty rate increases.

Moreover, review by this Court could prevent anticipated conflicts between the circuits in the many royalty readjustment cases that already have been or will be filed

outside the Tenth Circuit.[12] The fact that the District Court in the proceedings below arrived at a different lease/statutory conclusion than the Tenth Circuit clearly indicates that the readjustment issues raised here are likely to be subject to differing judicial results in the numerous district and circuit courts where they are or will be presented.

CONCLUSION

For the reasons set forth above, Amici urge this Court to issue a writ of certiorari.

Respectfully submitted,

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[12] The Amicus Brief filed by the National Coal Association *et al.* reports that cases raising the same issues as the instant case are now pending in the District of Columbia and Ninth Circuits. This is just the initial wave of court litigation; much more can be expected as DOI completes internal appellate actions in existing readjustment proceedings and institutes new readjustment actions in connection with the 200 pre-FCLAA leases that have not been readjusted.